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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-879

HEUBLEIN, INC., APPELLANT,

versus

SOUTH CAROLINA TAX COMMISSION, APPELLEE

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

FILED JANUARY 7, 1972
PROBABLE JURISDICTION NOTED FEBRUARY 28, 1972

RELEVANT DOCKET ENTRIES

1. January 2, 1969—Ruling by the South Carolina Tax Commission.
2. February 1, 1969—Heublein, Inc.'s payment under protest of the taxes assessed by the South Carolina Tax Commission.
3. February 20, 1969—Service by Heublein, Inc. of a Summons and Complaint upon the South Carolina Tax Commission.
4. April 30, 1969—Service by the South Carolina Tax Commission of their Answer upon Heublein, Inc.

5. July 28, 1970—Trial of the case before Judge John Grimball of the Court of Common Pleas.
6. February 18, 1971—Order signed by Judge Grimball of the Court of Common Pleas.
7. February 22, 1971—Notice of Intention to Appeal served by the South Carolina Tax Commission.
8. March 31, 1971—Transcript of Record filed with the South Carolina Supreme Court.
9. June 16, 1971—Oral argument before the South Carolina Supreme Court.
10. September 22, 1971—Opinion of the South Carolina Supreme Court filed.
11. October 1, 1971—Petition for Rehearing filed with the South Carolina Supreme Court.
12. October 11, 1971—Petition for Rehearing denied.
13. December 30, 1971—Notice of Appeal to the Supreme Court of the United States served.
14. January 7, 1972—Jurisdictional Statement (Heublein, Inc.) filed.
15. January 26, 1972—Brief of The Distilled Spirit Institute as *Amicus Curiae* filed.
16. February 1, 1972—Motion to Dismiss (South Carolina Tax Commission) filed.
17. February 28, 1972—Probable Jurisdiction noted.
18. February 29, 1972—Letter from the Supreme Court of the United States, Office of the Clerk, to the Solicitor General of the United States inviting him to file a Brief as *Amicus Curiae*.

BEFORE THE SOUTH CAROLINA TAX COMMISSION

STATE OF SOUTH CAROLINA,
COUNTY OF RICHLAND.

In Re: Heublein, Inc., a finding of whether the South Carolina income of the corporation is excluded from taxation by Public Law 86-272, now codified as 15 U. S. C. A. 381, *et seq.*

The corporation, a "registered producer" as defined by Article 7, Chapter 1, Title 4 of the Code of Laws of South Carolina, has a resident registered representative and has likewise registered the brands of its products that are sold in South Carolina. The corporation sells alcoholic beverages to licensed wholesalers and the taxation of the income from such business is the subject involved herein.

The Corporation Income Tax Division has assessed a tax on such income and the corporation appears before us today in protest of the assessment, contending that the income is not subject to taxation because of Public Law 86-272. That law sets up certain activities that the corporation may do and not be subject to taxation; however, Article 7, Chapter 1, Title 4, requires the corporation, in order to legally sell its products to the wholesalers, to engage in activities in South Carolina that exceed the minimum as provided for by Public Law 86-272. The corporation, however, contends that the South Carolina statutes are regulatory and in no way affect the taxability of the income. The provisions of the Article were a part of the general laws of the State prior to the enactment by the Federal Congress of Public Law 86-272. The corporation does not dispute the fact that it complies in every way with the requirements of the Article and thus engages in a legal business that would otherwise be illegal or prohibited.

Under such circumstances, the corporation's activities in South Carolina exceed the minimum requirements of Public Law 86-272 and the income therefore is taxable.

SOUTH CAROLINA TAX COMMISSION,

Columbia, South Carolina, ROBERT C. WASSON,
As of January 2, 1969. Chairman.

IN THE COURT OF COMMON PLEAS

STATE OF SOUTH CAROLINA,
COUNTY OF RICHLAND.

HEUBLEIN, INC., PLAINTIFF,

versus

SOUTH CAROLINA TAX COMMISSION, DEFENDANT

COMPLAINT

The Plaintiff herein, complaining of the Defendant herein, alleges:

(1) That the Plaintiff, Heublein, Inc., is a corporation duly organized and existing under the laws of the State of Connecticut and is not qualified to do business in the State of South Carolina.

(2) That the Defendant, South Carolina Tax Commission, is a department of the government of the State of South Carolina.

(3) That the Plaintiff following a ruling by the Defendant, South Carolina Tax Commission, filed a State of South Carolina Corporation Tax Return for the years ending June 30, 1963 through 1968 inclusive and paid the corporation income taxes and license fees attributable thereto, with interest thereon, on or about February 1, 1969, in the following respective sums:

Year	*Amount with Interest*
1963	$2,757.79
1964	3,614.36
1965	3,958.31
1966	4,288.08
1967	4,727.28
1968	4,961.27

or a total sum of $24,307.09, all payments having been made under protest.

(4) That the Plaintiff's representative solicits orders for alcoholic beverages within the State of South Carolina, which orders are sent outside the State for approval or rejection, and if approved, are filled by shipment or de-

livery from a point outside the State, and Plaintiff alleges that its activities within South Carolina in this regard do not exceed the minimum standards of Public Law 86-272 (Codified as 15 U. S. C. §§ 381-84) and that this Federal Statute bars South Carolina from imposing an income tax upon the Plaintiff.

(5) That in addition to the activities of the Plaintiff within South Carolina as are outlined in Paragraph (4) above, and as required by the regulatory provisions of the South Carolina liquor laws, South Carolina Code of Laws (1962) §§ 4-131-150, the Plaintiff has registered as a "registered producer," authorized to ship alcoholic beverages into the State and has designated its resident salesman in Columbia as a "producer representative" in whose care all shipments of Heublein's alcoholic beverages are consigned and the Plaintiff has not engaged in any activity in its compliance with these liquor laws other than the minimum required by them, but, nevertheless, the Defendant has ruled, wrongfully and illegally, that these actions and activities performed solely in compliance with the requirements of the State's liquor laws take the Plaintiff without the protection of Public Law 86-272, and subject it to the State's income tax.

(6) That under the correct interpretation of the facts and the law, the activities of the Plaintiff in compliance with the South Carolina liquor laws are but steps in the filling of orders "by shipment or delivery from a point outside of the State," and thus come within the express terms of Public Law 86-272; and if these activities in compliance with requirements of South Carolina liquor laws do exceed the minimum standards of Public Law 86-272, these activities still do not subject the Plaintiff to liability for income tax since such activities are performed under compulsion of the State; that the State may regulate the method and mechanics of the importation of alcoholic beverages under its police power, but its compliance with these regulatory provisions cannot subject the Plaintiff to another and different power now sought to be invoked by the State, to wit, this taxing power, which it is precluded from exercising because of the act of Congress, Public Law 86-272.

(7) That in addition to income tax, included in the payments heretofore referred to, there was an annual corporation license fee and since this license fee is predicated upon liability for income tax, the Defendant is precluded from assessing and collecting such license fee from the Plaintiff for the same reasons that it cannot assess and collect the income tax.

(8) That the Plaintiff, therefore, is informed and believes that the sums so assessed as income and license taxes for the years 1963 through 1968, inclusive, together with interest thereon, were illegally assessed and collected and that the Plaintiff is entitled to a refund of said payments in the amount of $24,307.09, together with interest, and that the Plaintiff is entitled to have this Court order that said refund be made.

(9) That the Plaintiff has exhausted its administrative remedies, the Defendant having on or about January 2, 1969, after hearing, handed down a formal ruling rejecting the position of the Plaintiff as is herein set forth and holding that the activities of the Plaintiff within this State in meeting the requirements of the regulatory provisions of South Carolina liquor laws constitute activities within this State which exceed the minimum requirements of Public Law 86-272.

WHEREFORE, the Plaintiff prays:

That this Court issue its order directing repayment to the Plaintiff of the sum of $24,307.09, together with interest thereon from date of payment, and for such other and further relief as may be just and proper.

ROBERTS, JENNINGS & THOMAS,
Attorneys for the Plaintiff.

707 Barringer Building,
Columbia, South Carolina,
February 19, 1969.

IN THE COURT OF COMMON PLEAS

(Caption Omitted in Printing)

ANSWER

The defendant herein, answering the Complaint of the plaintiff, respectfully shows to the Court:

1. That all of the allegations not specifically admitted, amended or modified are denied.

2. That the allegations of paragraphs 2, 3 and 9 are admitted.

3. That the allegations of paragraph 1 are admitted except that part alleging that the plaintiff is not qualified to do business in South Carolina, which part is denied.

4. That the allegations of paragraph 4 are denied except that part alleging that plaintiff's representative solicits orders for alcoholic beverages within the State of South Carolina, which part is admitted.

5. That the allegations of paragraph 5 are denied except that part alleging that the plaintiff is required by Sections 4-131-150 of the 1962 Code of Laws to register as a "registered producer", which requirements the plaintiff has complied with and that part alleging that the plaintiff has designated its resident salesman in Columbia as a "producer representative" to which shipments of alcoholic beverages into the State of South Carolina are consigned, which parts are admitted, and it is furthermore admitted that the defendant has ruled that the activities of the plaintiff subject it to the jurisdiction of the State of South Carolina and the imposition of the South Carolina income tax.

6. That the allegations of paragraph 6 are denied except that part alleging that the State may regulate the method and mechanics of the importation of alcoholic beverages, which part is admitted.

7. That the allegations of paragraph 7 are denied except that it is admitted by the defendant that included in the payments made by the plaintiff to the defendant was an annual corporation license fee.

8. That the allegations of paragraph 8 are denied.

WHEREFORE, the defendant, having fully answered all of the allegations of the plaintiff's Complaint, respectfully prays that it be dismissed and this action ended.

DANIEL R. McLEOD,
Attorney General of South Carolina,
JOE L. ALLEN, JR.,
Assistant Attorney General of South Carolina,
G. LEWIS ARGOE, JR.,
Assistant Attorney General of South Carolina,
Attorneys for Defendant.

Columbia, South Carolina,
April 30, 1969.
(Verification omitted in printing.)

IN THE COURT OF COMMON PLEAS
(Caption Omitted in Printing)

STIPULATION OF FACTS

For the purpose of the trial in this case, the parties have agreed that the following facts will be stipulated.

Heublein, Inc., hereinafter "Heublein," is a Connecticut corporation and has never applied for or received a certificate of qualification from the Secretary of State to do business in South Carolina. The defendant, the South Carolina Tax Commission, hereinafter called "the Commission," is a department of the government of the State of South Carolina. At issue in this suit is the South Carolina income and license tax liability of Heublein. The Commission ruled on or about January 2, 1969, that Heublein was subject to South Carolina tax. A copy of this ruling is attached hereto as "Appendix A." [A., 3] Following this ruling, Heublein filed State of South Carolina corporation tax returns for the years ending June 30, 1964 through 1968, inclusive, and on February 1, 1969, paid under protest the corporation income taxes and license fees which the defendant insisted were due, including interest in the following respective sums:

Year	*Amount with Interest*
1964	$3,614.36
1965	3,958.31
1966	4,288.08
1967	4,727.28
1968	4,961.27

or a total of $21,549.30.

On February 20, 1969, Heublein commenced this action for the recovery of the taxes paid under protest, together with interest.

The bulk of Heublein's activities within South Carolina relates to the importation, sale and delivery of its liquor products. During the years in question, Heublein had one employee in South Carolina, a Mr. Billy J. Belch, who resided in Columbia and who was a full time employee of Heublein.

In 1958, South Carolina passed legislation regulating the importation of alcoholic beverages into the State. This legislation appears as Article VII of the Alcoholic Beverage Control Act, Sections 4-131 to 4-150, 1962 Code of Laws of South Carolina. This Act provides that only "registered producers" may ship alcoholic liquors into the State, and that such liquors may be delivered only to the producer's "producer representative" who then may make delivery of the liquors to licensed wholesalers within the State. Shipments from without the State are to be made only by common carrier authorized to do business in South Carolina as such by the South Carolina Public Service Commission. Mr. Belch, Heublein's salesman and only employee in the State, was designated and qualified as its "producer representative."

The regulations issued by the Commission implementing the above Act provide that upon arrival in South Carolina and upon completion of delivery to the producer representative, the liquor shipment must either be stored in a licensed warehouse of a registered producer or turned over to a wholesaler pursuant to a certificate of transfer applied for by the producer representative and approved by the South Carolina Tax Commission. Heublein maintains no

such warehouses in South Carolina, hence all shipments into the State are turned over to the wholesaler in response to whose order the shipment was made.

In practice, shipments of alcoholic liquors into South Carolina were in response to orders of the Ben Arnold Company and were delivered to Heublein's producer representative at the wholesaler's address. Heublein, in compliance with the regulations prescribed and upon the forms prescribed, sent copies of the invoice and of the bill of lading to the Alcoholic Beverage Control Commission and to Mr. Belch. Upon arrival of the shipment by common carrier at the wholesaler's address, consigned to Heublein in care of Mr. Belch, the latter turned the shipment over to the wholesaler pursuant to a certificate of transfer obtained from the Commission in the manner previously indicated. He also, upon acceptance of delivery, furnished the Commission with a copy of the invoice with an endorsement thereon showing the date and place the delivery was accepted.

Heublein's liquor sales to military bases within South Carolina were treated in the same manner as other liquor sales with the exception that shipments were delivered to the military base, consigned to Heublein in care of Mr. Belch, instead of being delivered to the address of the wholesaler.

In addition to the activities referred to above pertaining to Heublein's sales of liquor products in South Carolina, Heublein sells food products in the State. Nonresident salesmen come into South Carolina and solicit orders which are sent out of the State for acceptance or rejection. If accepted they are filled by shipping goods from warehouses without South Carolina.

Heublein had a warehouse in South Carolina where it stored food products until January 31, 1963, at which time the warehouse was disposed of.

W. CROFT JENNINGS, JR.,
ROBERTS, JENNINGS & THOMAS,
Attorneys for Plaintiff.

DANIEL R. McLEOD,
Attorney General of South Carolina,
G. LEWIS ARGOE, JR.,
Assistant Attorney General of South Carolina,
JOE L. ALLEN, JR.,
Assistant Attorney General of South Carolina,
Attorneys for Defendant.

IN THE COURT OF COMMON PLEAS

(Caption Omitted in Printing)

TESTIMONY OF BILLY J. BELCH

(Tr., pp. 17-27)

Mr. B. J. Belch, a witness for the Plaintiff, who after being duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. JENNINGS:

Q. Mr. Belch, will you give your name, please?

A. Billy J. Belch.

Q. What is your job?

A. I'm a salesman. I have the title of State Manager in the State of South Carolina of Heublein as producer representative.

Q. Was this during the years of 1964 to 1968, the years in question?

A. Yes.

Q. As salesman and producer representative in South Carolina, what were your duties, what did you do?

A. To promote the sale of Heublein liquor products in the State of South Carolina.

Q. How did you do that?

A. By holding distributor sales meetings, by teaching distributor salesmen about our product to better inform them and let them know something about the history of our products so they could close their deals, to call on retail accounts and give them products story and reasons why they should use Heublein products.

Q. Who made the orders for Heublein products for South Carolina?

A. The distributor, our wholesaler.

Q. Did you have occasion to pick up an order from retail stores?

A. On rare occasions.

Q. What would you do with these orders?

A. Well, the order would be turned over to the wholesaler who would in turn bill and invoice. He would bill and ship the order in question.

Q. So it would be turned over to the Ben Arnold Company, is that your distributor in South Carolina?

A. That's true, Ben Arnold.

Q. And he would make an order pursuant to the order he had received from the retail man?

A. That's true.

Q. Does Heublein or did Heublein in the years in question have an office in South Carolina?

A. State that question again.

Q. Did Heublein have an office with its name on it?

A. No.

Q. Did it have a listing in the telephone directory in South Carolina?

A. No.

Q. Did Heublein own any automobile in the State of South Carolina?

A. No.

Q. It did not own the automobile you used?

A. No.

Q. Did Heublein have a warehouse in South Carolina?

A. No.

Q. Did it have a mailing address in South Carolina?

A. No.

Q. Did you provide your distributor salesmen with promotional material?

A. Yes.

Q. How about retail stores?

A. Yes.

Q. Did you have a sample allowance from Heublein Company?

A. Yes.

Q. Approximately how much was it?

A. About $40.00 a month.

Q. How did you use this sample allowance?

A. Well, most of the sample allowance was used for self-entertainment or I would say entertainment purposes. Some of it used was for personal consumption. Most of it, I would say, was used when I was travelling with a distributor salesman and at night, of course we wanted them to try out our products and use our products, of course, while I was travelling with them.

Q. You'd be on the road with them and in the evenings?

A. Very true.

Q. And you'd rather use Heublein products than somebody else's products?

A. Very true.

Q. Did you yourself have an office?

A. Yes, I have a personal office at home.

Q. Were you given any desk space at the Ben Arnold Company?

A. Yes, I had desk space at the distributor.

Q. What would you use this desk for at Ben Arnold Company?

A. Well, to make necessary reports that were required like marketing reports and I also used this space if I wanted to talk to an individual salesman about a particular product.

Q. Wasn't your desk space chiefly used to fill in the forms required by the South Carolina liquor law?

A. Yes, that's true.

Q. Did you pay, or did Heublein pay any rent for this desk space at Ben Arnold?

A. No.

Q. Did you ever collect a deposit from anybody on any order made for Heublein products?

A. No.

Q. Did you ever collect any money on Heublein?

A. No.

Q. Did you ever carry with you any Heublein products for sale?

A. No.

Q. With regard to the activities which you did on behalf of Heublein in compliance with South Carolina liquor law, that is filling out the necessary forms, making the transfers and so forth, would you have done this if it had not been required by law, by South Carolina law?

A. No.

Q. You were a salesman in South Carolina before this law that we're concerned with came into effect, is that right?

A. Yes, sir, a few months.

Q. And you did not engage in any of these activities before the law came into effect?

A. No.

Mr. Jennings: I have no further questions.

CROSS EXAMINATION

By Mr. ARGOE:

Q. Mr. Belch, you testified that your main responsibilities and duties were promoting the products of Heublein. Is it correct that you have never driven an automobile in South Carolina owned by Heublein?

A. That is true.

Q. In other words, you drive your own automobile in making your calls?

A. Yes, sir.

Q. Are you provided an expense allowance for the purpose of driving—covering your expenses?

A. Yes, sir.

Q. That would cover your automobile expenses as well?

A. Yes, sir.

Q. You state that you picked orders, and I was not clear from who you picked up orders. Do you on occasion pick up orders from retailers?

A. I have on occasion picked up orders from a retailer for delivery from the wholesaler.

Q. And you state this is only on rare occasions? What would be a rare occasion in your opinion?

A. Say that possibly I were calling on a retail package store and he would say "Bill, I'm short of half pints Smirnoff Vodka and would certainly like a case." I would certainly pick up the telephone and call my distributor and tell him to ship this customer a case.

Q. Did that occur frequently?

A. That particular occurrence, not too frequently.

Q. Were you in constant contact with the Ben Arnold Company?

A. Yes, sir.

Q. When in constant contact—would that mean a daily contact with them?

A. No, sir.

Q. Would you say every other day?

A. No, I would say at least weekly contact.

Q. Weekly contact? Did you take orders directly from the Ben Arnold Company and send those orders on to Connecticut where they were filled?

A. Only on rare occasions.

Q. How are the orders handled in this regard?

A. Well, the distributor checks his inventory every so often and of course submits orders directly to the distillery for shipment.

Q. Were you provided a copy of that order?

A. Yes.

Q. When it was made or before it was made?

A. Usually I picked up my copy of the order when I came into the office. Usually it was after the fact.

Q. Did you keep a sales record for your purposes regarding these orders?

A. Yes.

Q. You have stated that you were provided desk space at the Ben Arnold Company. Was this desk space used weekly, or monthly, or very often?

A. It was used at least weekly.

Q. So far as—you stated that you had no mailing—that Heublein maintained no mailing address in South Carolina. In the event that you were sought by your employer, were you called at the Ben Arnold Company or were you called at home?

A. Usually I was called at home and my wife could give them information unless I specifically put on an itenirary [*sic*] where I would be, and of course they could reach me at motels where I might be.

Q. Were you compensated in any way for the office space maintained at your residence, at your home?

A. No, sir.

Q. This was purely a personal office space maintained by you?

A. Yes, sir.

Q. Did you use that in performing your functions in any way, keeping your records?

A. Yes, sir.

Q. In other words you conducted or transacted business in the name of Heublein Company's office in your home?

A. Yes, sir.

Q. So far as you state that you were allowed and carried with you certain promotional material relating to the products and the sales products of Heublein, where did you keep these materials generally, store them?

A. The distributor has a warehouse where this merchandise is stored, a merchandising warehouse.

Q. Could you give us some idea of what kind of materials we are talking about?

A. Yes. Of course we had—most of the materials were of a cardboard or wire nature, display, case cards, pamphlets, booklets, recipes, and this kind of material used for building displays, stores.

Q. And would you restate where you kept these, where these were stored?

A. These were stored in the distributors display house in a room.

Q. Did you carry those materials with you in an automobile for the purpose of distributing them among retailers?

A. Yes.

Q. Are you familiar with and basically aware of all of the retailers in South Carolina, the retail liquor dealers in South Carolina?

A. Yes, at one time I think I knew them all pretty well.

Q. You called upon them often?

A. As often as I could.

Q. You state also that you had a sample allowance which is an allowance of liquor for which you state you use for self entertainment, travelling use, distribution. Would you restate the amount of that allowance?

A. I said about forty dollars a month.

Q. Where did you acquire this liquor that you used in your sample allowance?

A. Many times I purchased it from retail package stores. On occasions I have purchased the merchandise from the distributor warehouse.

Q. In so doing, would you be reimbursed by Heublein for the amount of the purchase?

A. Yes.

Q. Does Heublein maintain—excuse me—does Heublein sell to any other distributor or wholesaler other than the Ben Arnold Company?

A. Yes. We had one other distributor. Now, the time in question here is—

Q. '64 to '68.

A. I think we possibly had Columbia Distributor for a few of our products during the latter part of that period. The exact date, of course, I can't remember.

Q. So far as your functions are concerned under the Alcohol or Beverage Control Act, you were registered as a producer representative at that time with the Tax Commission?

A. Yes.

Q. And you performed all the functions required pursuant to the Alcohol Beverage Control Act?

A. I should hope that I did.

Q. Could you give us an idea, a statement as to the handling of alcoholic liquors shipped into South Carolina without the bounds of this state, how they were handled during this time and how in your responsibilities and requirements you were turning this liquor over to the wholesaler?

A. Yes. In other words, you want me to go into from the time the order was placed until it was shipped?

Q. I would just like a brief statement regarding the handling and importation of that liquor into South Carolina.

A. All right. Well, actually an order is placed by a wholesaler or a distributor to a distillery. The distillery either accepts or rejects the order depending after the order has been checked for credit and whether this particular distributor is set up to sell this particular brand in the State. The order is then shipped directly to the distributor by motor freight line. At the time the shipment is made the distillery sends a copy of the invoice along with the copy of the original bill of lading to the Tax Commission or the ABC Commission. They send necessary copies of the invoice to the distributor. When the shipment is made they usually send three copies of the invoice to me. They were supposed to send three copies of the invoice to me. One of these copies I used as a receiving report for the Tax Commission or the ABC Commission and one I signed as transmittal papers to turn the merchandise over to the distributor and I made out the necessary permit required by the Tax Commission or the ABC Commission during that time and submitted these along with the two copies of the invoice, the one I used for receiving report and one as transmittal papers. That was pretty much it.

Q. And once you received the papers or the approval of the Tax Commission or ABC Commission this liquor was sent over to Ben Arnold Company or to the purchaser, is that correct?

A. Well, this was usually after the fact, Mr. Argoe. In other words, many times these invoices they have issued come in before the shipment and I may have been out of town at the time the invoices came in.

Q. Referring back to one further question regarding the handling of orders—is it—do you have knowledge, do you have the knowledge as to any instance where Heublein refused to fill an order of the Ben Arnold Company?

A. No, sir.

Q. Whether that order be accepted—whether that order be sent by the Ben Arnold Company to Heublein in Connecticut directly or whether or not you took the order and sent it in to Connecticut?

A. I don't remember ever sending in an order myself personally.

Q. You never forwarded an order, an order taken from the Ben Arnold Company to the home office in Connecticut?

A. Not a so-called paper order. I used the telephone to call additional orders.

Q. You have called in orders and these orders were as a practice always filled, provided that they could have been filled?

A. That's true.

Mr. ARGOE: No more questions, thank you.

RE-DIRECT EXAMINATION

By Mr. JENNINGS:

Q. Mr. Belch, when Mr. Argoe asked you if you did transact Heublein business from your home, weren't you really filling out the papers that you're required to fill out and used your home as an office in your activities with Heublein?

A. That's true.

Q. You weren't doing any selling from your home or filling of orders from your home?

A. No.

Mr. JENNINGS: No other questions.

The COURT: Thank you, sir.

TESTIMONY OF MICHAEL F. EGAN

(Tr., pp. 27-38)

Mr. Michael F. Egan, a witness called by the plaintiff, who after being duly sworn, testifies as follows:

DIRECT EXAMINATION

By Mr. JENNINGS:

Q. Mr. Egan, what is your title with Heublein?

A. I'm manager for order entry.

Q. How long have you been associated with Heublein?

A. Approximately six years.

Mr. ROBERTS: You said order entry?

A. Yes, sir.

Q. Are you familiar with the way Heublein does business in South Carolina during that time?

A. Yes.

Q. Would you explain how a typical order from the South Carolina distributor which I understand is solely Ben Arnold has been handled?

A. In the case of Ben Arnold almost all of their orders are typewritten orders from Ben Arnold transmitted through the mail to our Hartford office.

Q. I wonder if I might give you some orders. Is this a typical purchase order and accompanying papers?

A. Yes, sir.

The COURT: Mr. Argoe, have you seen these?

Mr. ARGOE: Yes, sir.

The COURT: Take a look at them and see if you have any objections.

Mr. ARGOE: May I ask Mr. Brown to bring his chair over here so I might confer with him?

The COURT: Certainly.

Mr. ARGOE: We have no objection.

The COURT: Just mark them as one exhibit. Just hand them to the reporter.

(Sheaf of orders received as Plaintiff's Exhibit No. 1.)

Q. Now, Mr. Egan, would you explain what those papers are and what happens?

A. Well, the first copy is the customer's purchase order prepared by the customer and it's forwarded through the mail to our Hartford office.

The COURT: Give a date if you have any and invoice number.

A. It was purchase order number—

Mr. ARGOE: Your Honor, may I ask one question here. I note the date is a 1969 date. Would counsel for the plaintiff submit that this is the way all of the transactions were handled during the years '64 to '68?

Mr. ROBERTS: Yes, sir. We couldn't find those. He will so testify.

Q. All right. When you get the purchase order from Ben Arnold Company—I take it Ben Arnold Company is your sole purchaser from South Carolina, is that right?

A. Our sole four line distributor. We have one other distributor.

Q. With the purchase—when the purchase order arrives from Ben Arnold, what happens, what do you do with it?

A. It's received in the order entry department and at that point is transposed onto our purchase order form, the Heublein purchase order form.

The COURT: That's this long document with the various brands set out on it?

A. Yes, sir.

Q. What is the purpose?

A. The purpose of transposing that to our form is to make it more readily available for the key-punch operator to prepare for the computer. Most of our customers have various purchase order forms so as to make it uniform, we have devised our own purchase order and all orders are transposed over on this purchase order to make it more easily available for the girl to punch with all the pertinent information from the original purchase order as to number, routing and as far as the shipping date on the file, right hand corner, "ship date", on the long purchase order form. This will be the date the merchandise is to be shipped from Hartford to Ben Arnold.

Q. What is the next piece of paper?

A. From the long purchase order form a hard copy is produced, an order acknowledgment. This is a five part form which is sent back through the mail to the customer acknowledging his order, his order number, when we will ship it and the exact merchandise on the order.

Q. What does it say on there with regard to the billing process, anything?

A. At this point there is nothing, there's no relation to the billing.

Q. Is there a notation there on freight collect?

A. Yes, sir, there is.

Q. What does that mean to Heublein?

A. Once the merchandise leaves our door—

Mr. ARGOE: I'd like to impose an objection to any testimony relating to the freight and to the responsibility for that freight as being *contra* to the ABC law inasmuch as the ABC law requires that liquor be shipped into South Carolina only to a producer representative and thereafter turned over to the wholesaler or the distributor and anything regarding the shipment to Hartford to South Carolina being assumed by the wholesaler would be *contra* to the ABC law which requires that the liquor be delivered from a point within South Carolina by Heublein to the wholesaler, in this case the Ben Arnold Company.

The COURT: Well, is the procedure that is being outlined generally the procedure followed by all of these whiskey or liquor manufacturers in shipping their product into South Carolina, or are they required to—would Heublein be required to actually have a warehouse or building into which the products were unloaded and then reloaded and sent to Ben Arnold?

Mr. ARGOE: Your Honor, that is specifically answered and required by law, specifically Section 4-141. They're either required to have a warehouse in South Carolina, or either they are required to accept delivery, the producer representative is required to accept delivery in Heublein's name in South Carolina and thereafter turn that shipment over to the wholesaler. Now, if you'll bear with me, I'd like to read one sentence which I think would be better lan-

guage than my words and that sentence is "Immediately upon acceptance of delivery of the shipment by the producer's representative, the producer's representative shall furnish the Tax Commission with a copy of the invoice covering the shipment with endorsement thereon showing times and date—" I'm afraid that's not the one I meant. "Alcoholic liquors shall be shipped or moved only to the registered producer in care of the producer representative who is registered to handle the property as the registered producer of the originating shipment." This is all set out in 4-141 and 4-142, the requirements that must be followed to import from without the State liquor into the State.

The COURT: It's your interpretation then, of that law, that Heublein or any other manufacturer of similar products would be required to actually have in existence some type of warehouse or building in to which the shipment was unloaded and then to be reloaded and taken to the distributor?

Mr. ARGOE: Physically, it does not have to be handled that way. This is set out by law and it does not have to be handled that way but as a matter of law, Heublein has no authority to deliver liquor directly to a wholesaler in South Carolina. They must deliver that liquor to a producer representative and thereafter, that liquor may be turned over or delivered to the wholesaler. This is specifically set out in this section.

The COURT: Well, let's assume as has been testified to that Mr. Belch has a desk at Ben Arnold's office. Wouldn't it be practical for the shipper to come to Mr. Belch with the shipment at the Ben Arnold office and hand him a document and say that the product that was ordered is outside in the truck and then for Mr. Belch to notify Ben Arnold and it be unloaded into Ben Arnold's warehouse?

Mr. ARGOE: In practice that is accepted by law, but delivery must be made directly to the producer representative. In practice the liquor may be delivered, consigned to this particular destination or point, but by law, they are required to accept delivery. Heublein cannot ship from without the State liquor direct to the wholesaler within the State.

Mr. ROBERTS: I think I might be able to clarify that a little bit. I don't think Mr. Argoe disputes the method of handling. I think he's got in mind simply about where title passes and that is marked FOB in Connecticut. I don't think where title passes has anything to do with it. I gather that's what he's complaining about, that this FOB shipment might have some bearing where title passes. We don't think it make any difference. He doesn't deny we're doing what the statute says.

The COURT: Mr. Argoe, despite the fact of the testimony as to the manner in which a shipment is handled may be in violation of the statute and apparently it's your opinion that it is, that would not make the testimony of the witness not receivable by the Court. It would not be objectionable because of the fact that they may have handled the shipment in some manner that did not legally meet the requirements of the statute, and of course that's one of the questions that I will have to determine. But I will have to receive the testimony as it's being offered. So your objection to the testimony is overruled. You may proceed, Mr. Jennings.

Q. We were on the acknowledgment form that is noted on there. I believe you said the notation is freight collect?

A. Yes, it is.

Q. What does that mean to Heublein?

A. Freight collect meaning that the recipient of the merchandise will pay the freight charge.

Q. Does South Carolina—I guess all the States require stamps on alcoholic beverages. How is the stamp problem treated with South Carolina shipments?

A. At the time the customer prepares his purchase order he requests the ABC Board of South Carolina, or purchases the quantity of stamps needed and these stamps are in turn forwarded to Hartford and are affixed to the bottle of the merchandise produced.

Q. In Hartford?

A. In Hartford.

Q. What else is in that form?

A. After the acknowledgment form is prepared and mailed to the customer acknowledging the order, the next

form would be the bill of lading which is prepared at time of shipment stating much of the same information, cases that were shipped, the date that it was shipped, serial number of cases that were shipped and this document goes along with the trucker; at the time the invoice is generated another copy goes with the invoice and also Ben Arnold Company receives a copy.

Q. You're talking about the bill of lading now. What about the invoice?

A. Another copy of the bill of lading is internally forwarded to our billing department and at that time invoices generate from the bill of lading.

Q. There are two other pieces of paper, I believe, production order—is that in that pack that I gave you?

A. At the time the order of acknowledgment is typed and mailed back to the customer acknowledging his order a paper tape which is generated from the computer will create a production order to our department in Hartford giving them authority to produce this order, giving them the same information that is on the order acknowledgment. This tells our production department that this merchandise has to be ready by the date scheduled for shipment.

Q. Is there a packing list?

A. The packing list is a part of the bill of lading. In other words, the packing list is generated with the bill of lading. We're talking about multicopy forms. Every document we produce there are at least five or six copies which are mailed outside and internally in the company satisfying this requirement. When the bill of lading is generated the packing list is also a part of the bill of lading because of distribution of bills of lading going out of the company and within the company, a packing list goes along with the bill of lading to our billing department. The packing list and the bill of lading is one and the same, is used to generate our invoice which is the copy attached to the packing list. There again the invoice has the pertinent information as to the customers purchase order, the date the merchandise was shipped and means of transportation, type of freight charges and terms, quantity, per case price and total extension.

Q. Mr. Egan, I believe there are some differences in dates and numbers on those forms. Would you explain why the difference?

A. We tried to go back as far as we could to get a particular sample of an order in '69. These are three months requirements we have retaining our forms. We no longer have any '69 forms so what we did was get our most recent order, which are handled the same way now as they were at the time in question. So on the blue acknowledgment, the number is different, but the procedure is the same and the forms are the same. Back in '69 once a shipment is billed and payment received from the customer, after a period of two or three months, we discard the paper work because the transaction is consummated.

Q. When Ben Arnold receives the shipment and makes payment, how do they make payment?

A. Ben Arnold will make payment by check through the mail to the nearest lock box. We have a regional lock box.

Q. Where is the nearest regionable lock box?

A. In this case I believe it is in Atlanta, Georgia. In other words, the invoice stipulates on the right hand corner, please remit to Heublein Company, Box 3395, Atlanta, Georgia.

Q. You do not have a lock box in South Carolina?

A. No, we don't.

Mr. JENNINGS: No further questions of Mr. Egan—just one other thing—

Q. Mr. Egan, when the purchase order comes in, what options do you have in treatment of that purchase order? Do you have the option to accept it or reject it?

A. Yes, we do. The policy when the order comes into the Hartford order entry a credit check is made and at that time it is determined whether we will honor the order or reject it. Once a customer receives a copy of acknowledgment that means we will accept the order and will ship.

Mr. JENNINGS: Answer any questions Mr. Argoe has if you please, Mr. Egan.

CROSS EXAMINATION

By Mr. ARGOE:

Q. Can you recollect any instance where the liquor was not delivered or the delivery was refused to Ben Arnold Company?

A. No, sir.

Mr. ARGOE: I have no further questions.

The COURT: I probably made a mistake in marking these forms as one exhibit. You referred to these papers by various names. Go through the transaction again, naming the documents and hand them one at a time to the Reporter. Jim, you mark them A, B, C and D and so forth.

A. The first copy is the customer purchase order made out by the customer and sent through the mail to Hartford.

(Customer purchase order marked Exhibit No. 1-A.)

A. The next exhibit will be our internal purchase order form whereby we transpose the customers purchase order onto our own form.

(Internal purchase order marked Exhibit No. 1-B.)

A. The next exhibit is our order acknowledgment which is typed from the purchase order form, acknowledging the customer's order.

(Order of acknowledgment marked as Exhibit No. 1-C.)

A. And the next exhibit is the production order which directs our department to go ahead and produce this product for Ben Arnold.

(Production order marked as Exhibit No. 1-D.)

A. The next form is the bill of lading which is produced at the time of shipment.

(Bill of lading marked as Exhibit No. 1-E, and packing list.)

A. The bill of lading and the packing list are one and the same. You might want to attach these two together. These are one and the same. The last document in our cycle is the customer invoice.

(Customer invoice marked as Exhibit No. 1-F.)

The COURT: Are you acquainted with what happens in South Carolina when the shipment arrives?

A. Yes, sir.

The COURT: Give us that information.

A. The first acknowledgment we make is the Bill of lading is produced at time of shipment, when the merchandise will leave. At the same time we mail a bill of lading to Mr. Billy Belch. The merchandise is received at the Ben Arnold location. Mr. Belch will turn over his document to the Ben Arnold Company, in other words, releasing the merchandise over to Ben Arnold.

The COURT: And it will be unloaded in the Ben Arnold warehouse?

A. Yes, it will.

The COURT: Is there anything further?

Mr. ARGOE: No, sir.

Mr. JENNINGS: We have nothing further.

The COURT: Thank you, sir.

Mr. JENNINGS: Your Honor, that's all the testimony we have this morning.

The COURT: Mr. Argoe, do you have some testimony you want to offer?

Mr. ARGOE: Yes, sir, I would like to call Mr. Norwood Gale for one or two questions.

(Defendant's case.)

IN THE COURT OF COMMON PLEAS

(Caption Omitted in Printing)

ORDER

At issue in this case is the South Carolina income and license tax liability of Heublein, Inc. for the years ending June 30, 1964 through 1968, inclusive. On or about January 2, 1969, the South Carolina Tax Commission ruled that Heublein, Inc. was responsible for these taxes. On February 1, 1969, Heublein paid these taxes, amounting to $21,549.30, including interest, and brought timely suit to recover same. This case was heard by me on July 28, 1970, and thereafter briefs were submitted by both parties.

The defendant, the South Carolina Tax Commission, is a department of the government of the State of South Carolina. The plaintiff, Heublein, Inc., is a Connecticut corporation with its principal office in Hartford, Connecti-

cut. It manufactures alcoholic beverages which are sold throughout the United States, including South Carolina.

Heublein challenged the assessments on the ground that it was not liable for the taxes by virtue of Public Law 86-272.[1]

In 1958, South Carolina enacted legislation, appearing as Article VII of the Alcoholic Beverage Control Act, §§ 4-131 to 4-150 of the South Carolina Code of Laws, 1962. This statute requires, among other things, that a person shipping alcoholic liquors into South Carolina shall register with the Commission as a "registered producer" and appoint a "producer-representative." Each time alcoholic liquors are shipped from without the State into South Carolina, they must be consigned to the registered producer in care of the producer-representative, who is required to deliver the goods to the purchaser after obtaining from the Commission permission for transfer. The shipper is required to mail to the Commission and the producer-representative a copy of the invoice covering the shipment. The producer-representative certifies as to delivery on the invoice copy sent to him and mails it to the Commission.

During the years in question, Heublein had one employee in South Carolina, a Mr. Billy J. Belch, who resided in Columbia and was a full-time employee. The Ben Arnold Company, Inc. of Columbia was the wholesaler who acted as the distributor of Heublein products in South Carolina.

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[1] 15 U. S. C. § 381. *Imposition of net income tax—Minimum standards.*

(a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and,

(2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

The act continues, but it is sufficient for the purpose of this Order to restrict ourselves to the above quoted portion.

In South Carolina, Heublein has no office, no warehouse, no telephone listing, no automobile, and no mailing address. Mr. Belch had an office in his home. Mr. Belch worked to further sales of Heublein's products in South Carolina in two ways. He would brief the salesmen of the Ben Arnold Company, to better inform them and to let them know something of the history of the Heublein products. He would also call upon Ben Arnold's retail accounts, tell them about Heublein products, and leave promotional materials with them. Mr. Belch had a sample allowance of about $40.00 a month which he used for personal consumption and for entertainment. Occasionally, when on the road, Mr. Belch would pick up an order for Heublein's products from a retailer and, as an accommodation, deliver it to the Ben Arnold Company. Orders for Heublein products would be placed by the wholesaler, the Ben Arnold Company, with Heublein's home office in Hartford, Connecticut. When the order was accepted, an acknowledgment would be sent from Heublein to the Ben Arnold Company and Heublein would indicate when the order would be shipped. In Hartford, the goods ordered would then be prepared for shipment and South Carolina Alcoholic Beverage Stamps, supplied by the Ben Arnold Company, would be affixed. When shipped, these items moved by common carrier, F.O.B. Hartford, Connecticut, consigned to Heublein in care of Mr. Belch at the premises of the Ben Arnold Company. Ben Arnold made payment to Heublein for the orders by sending checks to a lock box in Atlanta, Georgia.

The statute and the regulations issued by the Tax Commission implementing the above act provide that upon arrival in South Carolina and upon completion of delivery to the producer-representative, the alcoholic beverages must either (1) be stored in a licensed warehouse of the registered producer or (2) be turned over to a wholesaler, pursuant to a Certificate of Transfer applied for by the producer-representative and approved by the Tax Commission. Heublein maintained no warehouse in South Carolina, hence all shipments into the state were turned over to the wholesaler in response to whose order the shipment was made. In practice, shipments of alcoholic beverages into

South Carolina were delivered by the common carrier to Heublein's producer-representative at the wholesaler's address. Heublein, in compliance with the regulations prescribed and upon the forms prescribed, sent copies of the invoice and of the bill of lading to the Alcoholic Beverage Control Commission and to Mr. Belch. Upon arrival of the shipment by common carrier at the wholesaler's address, consigned to Heublein in care of Mr. Belch, Mr. Belch turned the shipment over to the wholesaler pursuant to the Certificate of Transfer obtained from the Alcoholic Beverage Control Commission in the manner previously indicated. Mr. Belch also furnished the Alcoholic Beverage Control Commission a copy of the invoice, with an endorsement thereon showing the date and place delivery was accepted. To facilitate the paper work involved in complying with the mechanics of the statute, the producer-representative was given desk space at the Ben Arnold Company, and for this desk space Heublein paid no rent.

Prior to the passage of the 1958 South Carolina legislation, Heublein did not engage in any of the activities specifically required by this legislation.

Heublein maintains that Public Law 86-272 is controlling. This act was passed as the reaction of Congress to the United States Supreme Court decision in *Northwestern States Portland Cement Co. v. Minnesota,* 358 U. S. 450, 79 S. Ct. 357 (1959). In this case, the Supreme Court was asked to decide whether certain activities of the taxpayers, corporations engaged in interstate commerce, were sufficient to provide a nexus with the state so that there might be an income tax levied on the corporations as a result of such activity. The Supreme Court, in answering this question, provided broad, general language to the effect that if the income tax was "not discriminatory and is properly apportioned to local activities within the taxing State," the state may subject the corporation to a state income tax.

This decision caused a great deal of consternation among the firms engaged in interstate commerce. Senator Harry Byrd of Virginia, Chairman of the Senate Finance Committee, in the Committee Report on what became Public Law 86-272, gave reasons for the concern. The Report

pointed out that there were (at that time) at least thirty-five states, the District of Columbia, and some eight cities which taxed business income, including earnings derived from interstate commerce, where there was some local business activity. Of all these taxing entities, no two had the same apportionment formula and all had widely varying definitions of the word "sale." It was apparent that unless some uniformity were introduced into the field of state taxation of interstate commerce, many businesses, particularly small or medium size ones, would be reluctant to expand their operations, and the implications for the national economy might well be unfortunate. In accordance with the need envisioned by the Senate Finance Committee, the Interstate Income Tax Law, Public Law 86-272, was enacted to provide uniformity and certainty in the area of state taxation of net income derived from interstate commerce. This act, which was approved September 14, 1959, provides that a state may not impose an income tax on income derived within that state from interstate commerce if the only business activity within the state does not exceed certain minimum standards. In essence, these minimum standards are (1) solicitation of orders within the state which (2) are sent outside the state for approval or rejection and, (3) if approved, are filled by shipment or delivery from a point outside the state. Heublein points out that Public Law 86-272 does not adopt the criterion of "sale," but rather the more specific criterion of sending of orders out of the state for acceptance, and shipment or delivery from a point outside the state.

Public Law 86-272 was held to be constitutional in *Smith, Kline & French Lab. v. State Tax Comm'n.*, 403 P. (2d) 374 (Ore. 1965); *State ex rel CIBA Pharmaceutical Products, Inc. v. State Tax Comm'n.*, 382 S. W. (2d) 645 (Mo. 1964); and *International Shoe Co. v. Cocreham*, 246 La. 244, 164 So. (2d) 314 (1964), *cert. denied*, 379 U. S. 902 (1964).

Heublein maintains that all of its activities within South Carolina come within the minimum activities allowable by Public Law 86-272. Heublein's activities fall into two categories: first, the activities which Heublein does of

its own volition and, second, the activities which Heublein does only because it is required to do so by the South Carolina liquor laws.

Setting aside for the moment these activities which Heublein does as a result of state compulsion, I am of the opinion and so find that all other activities of Heublein come within the minimum allowable by Public Law 86-272. These activities engaged in by Heublein are very similar to the activities which have been previously considered by courts and found to be acceptable as within the minimum permitted by Public Law 86-272. *See, e. g., Smith, Kline & French Lab. v. State Tax Comm'n., supra; and, State ex rel. CIBA Pharmaceutical Products, Inc. v. State Tax Comm'n., supra.*

I now turn to a consideration of whether the activities which Heublein was forced to do by the reason of the South Carolina Alcoholic Beverage Control Laws are sufficient to cause Heublein to come without the protection of Public Law 86-272. In this instance, Heublein is compelled by the State to follow a specific statutory procedure in making delivery from without the State to the wholesaler-purchaser within the State. The State may prescribe the delivery procedure, but compliance with such requirements cannot deprive Heublein of the effectiveness or applicability of the federal law on this subject. Such state-imposed minimum requirements therefore come within the minimum activities protected by Public Law 86-272. To hold otherwise would set the various taxing authorities free to devise all manner of restrictive regulations so that they might avoid the effect of Public Law 86-272.

Accordingly, I find and hold that Heublein did not exceed the minimum activities permitted by Public Law 86-272, and therefore Heublein is not liable for South Carolina income or license taxes.[2]

Heublein has also maintained, and I think correctly, that even if it were decided that because of its compliance with the South Carolina Alcoholic Beverage Control Laws Heublein has exceeded the minimum requirements of Pub-

[2] The license tax must fall since it is predicated on liability for income tax.

lic Law 86-272 (which I have found not to be the case), nevertheless Heublein would not be liable for South Carolina income taxes because the power of a state to tax may not be extended under the guise of the exercise of its police power.

The State's power under the twenty-first amendment to the United States Constitution is to regulate the liquor traffic. This power is not challenged by Heublein. However, the police power and the power to tax are two separate and distinct powers. This point was made quite clear in *Oklahoma Tax Comm'n. v. Brown-Forman Distillers Corp.*, 420 P. (2d) 894 (Okla. 1966). There is no substantial difference in the position taken by the Oklahoma Tax Commission in *Brown-Forman* (that simply because a corporation deals in alcoholic beverages the state can impose an income tax) and the position taken by the South Carolina Tax Commission in this case (that because a corporation deals in alcoholic beverages the state can make it do certain things and when it does those things the state can then subject it to an income tax). Neither the state nor its tax authorities may use the state's police power over the liquor traffic so as to subject a foreign corporation to a state income tax in circumstances where it would not otherwise be liable. Such would be a patent abuse of the state's police power.

I hold that following the regulations legally prescribed by the State for importing alcoholic beverages from without the State is but a step in the "shipment or delivery" of the goods referred to in Public Law 86-272; but, if such compliance be regarded as performance by Heublein of acts beyond the minimum requirements set up by Public Law 86-272, such acts are done under compulsion and cannot be invoked to subject Heublein to an income tax from which it otherwise is protected by the Act of Congress.

Accordingly, the Court hereby certifies of record, in accordance with § 65-2662, South Carolina Code of Laws, 1962, that taxes in the amount of $21,549.30 have been wrongfully collected from Heublein, Inc. by the South Car-

olina Tax Commission and ought to be refunded, together with interest at the legal rate from February 1, 1969.

AND IT IS SO ORDERED.

JOHN GRIMBALL,
Resident Judge,
Fifth Judicial Circuit.

Columbia, South Carolina,
February 18, 1971.

IN THE SUPREME COURT OF SOUTH CAROLINA

HEUBLEIN, INC., RESPONDENT,
versus
SOUTH CAROLINA TAX COMMISSION, APPELLANT
[254 S. C. 17, 183 S. E. (2d) 710 (1971)]

Opinion No. 19289
Filed September 22, 1971

REVERSED AND REMANDED

Attorney General Daniel R. McLeod and Assistant Attorneys General Joe L. Allen, Jr., and G. Lewis Argoe, Jr., all of Columbia, for appellant.

Carlisle Roberts and W. Croft Jennings, Jr., both of Roberts, Jennings & Thomas, of Columbia, for respondent.

LEWIS, A. J.: The question to be decided is whether respondent, Heublein, Inc., a Connecticut corporation, is liable to the State of South Carolina for income and license taxes assessed on the basis of Heublein's sales of alcoholic beverages in the State for the years 1964-68. The taxes were assessed by the appellant, South Carolina Tax Commission, paid under protest, and this action brought by Heublein to recover the taxes so paid. The lower court, in accord with Heublein's contention, held that Heublein was exempt from the payment of income and license taxes to South Carolina by virtue of the provisions of an Act of Congress, referred to as Public Law 86-272, the pertinent portion found in 15 U. S. C. A. Section 381.

Heublein's claim of exemption from taxation in South Carolina is based solely on the provisions of the foregoing Federal statute. Under its pertinent provisions, Congress enacted that no State shall have power to impose a net

income tax on income derived within the State from interstate commerce, if the only business activity within the State was solicitation of orders for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State.

Under the powers reserved to the State by the Twenty-first Amendment, South Carolina has adopted its Alcoholic Beverage Control Act which prescribes the conditions under which alcoholic liquors may be imported into the State. Sections 4-131 to 4-150, 1962 Code of Laws. This statute requires that a producer of alcoholic beverages, before shipping liquor into South Carolina, must be registered with the State and that such producer appoint a "producer-representative" who shall be a resident of the State. It is further provided that shipment of alcoholic liquors into the State must be made to the "registered representative" of the producer who must accept delivery of the liquors within the geographical limits of South Carolina. Thereafter, the producer, through his representative, is authorized to make delivery of the alcoholic liquors from within South Carolina to a licensed wholesaler in the State. The "producer-representative" then certifies as to such delivery to the appellant Tax Commission.

All shipments of liquors into South Carolina for sale must be made to the shippers own representative within the State. Delivery is then made intrastate to the purchaser and such sale can be made in no other way. These statutory provisions preclude the sale of alcoholic liquors in South Carolina through interstate sales. Such constitutes a valid exercise of the State's powers under the Twenty-first Amendment. *State v. Kilgore,* 233 S. C. 6, 103 S. E. (2d) 321, citing *Ziffrin, Inc. v. Reeves,* 308 U. S. 132, 60 S. Ct. 163, 84 L. Ed. 128; *State Board of Equalization of California v. Young's Market Co.,* 299 U. S. 59, 57 S. Ct. 77, 81 L. Ed. 38.

Public Law 86-272 is applicable when delivery is made from a point outside the State and is inapplicable to sales and delivery consummated within the State.

It is conceded that the sales here involved were made in accordance with the State statutory requirements. They were, therefore, intrastate transactions and beyond the reach of Public Law 86-272.

The taxes here in question were properly assessed against Heublein. The judgment of the lower court is accordingly reversed and the cause remanded for entry of judgment in favor of the appellant, South Carolina Tax Commission.

MOSS, C. J., BUSSEY, BRAILSFORD, and LITTLEJOHN, JJ., concur.

IN THE SUPREME COURT OF SOUTH CAROLINA

(Caption Omitted in Printing)

PETITION FOR REHEARING

Opinion No. 19289

Filed September 22, 1971

The Plaintiff-Respondent respectfully petitions the Court for a Rehearing in this case upon the grounds that:

(1) The Court overlooked the fact that the Federal Statute, Public Law 86-272, is in the alternative—that is "orders filled by shipment **or** delivery from a point outside the State." Therefore, even if delivery in this instance be considered as taking place within the State, **shipment** is from a point outside the State and thus Heublein is exempt from State income taxation.

(2) In holding that sales here were "intrastate transactions and beyond the reach of Public Law 86-272," the Court overlooked the fact that the Federal Act was passed in large measure because of the divergent views among the several state taxing authorities and among the courts as to "when title passed" or "where a sale took place," and the Act intentionally gets away from such tests. (See Transcript, pp. 48-49, ff. 191-194.)

(3) In holding that the sales here involved were "intrastate transactions and beyond the reach of Public Law 86-272," the Court overlooked the fact that the "shipment or delivery from a point outside the State," exempted un-

der Public Law 86-272, must contemplate an **effective** shipment or delivery and thus any act in compliance with a delivery procedure which is required by the State under its police power is a part of the "delivery" which is protected by the Federal Act.

(4) In holding that the provisions of the State Alcoholic Beverage Control Act preclude the sale of alcoholic liquors in South Carolina through interstate sales and "such constitutes a valid exercise of the State's powers under the Twenty-first Amendment," the Court has misapprehended the purpose and effect of the Twenty-first Amendment, which preserves to the State the right under its police power to regulate or prohibit the sale of intoxicating liquors, but does not at all affect the power of Congress to regulate and define interstate commerce in intoxicating liquors and to prescribe the income tax status of such shipments; this Court has overlooked the decisions holding that the Twenty-first Amendment has not *pro tanto* repealed the Commerce Clause of the Constitution but that both must be construed together. (See Respondent's Brief, p. 8.)

(5) It is respectfully submitted that in disposing of this case upon a narrow single point without discussion of the various issues raised the Court has overlooked the significance of the issues here involved, as applying not only to this taxpayer and the South Carolina Tax Commission, but also their significance to all other companies similarly situated both in South Carolina and alcoholic beverage manufacturers who sell throughout the United States and we suggest that a multiplicity of actions may well result from efforts to receive answers to the questions now left unresolved by the Court.

Respectfully submitted,

ROBERTS, JENNINGS &
THOMAS,
By: CARLISLE ROBERTS,
W. CROFT JENNINGS, JR.
Post Office Box 1792,
Columbia, South Carolina.
October 1, 1971.

CERTIFICATE

I hereby certify that I am a practicing attorney of the Columbia, South Carolina Bar and that I am not concerned in the above-entitled case. I have reviewed the Transcript of Record, the Brief of Appellant, the Brief of the Respondent, the Opinion of the Court in this case, and also the foregoing Petition, and in my opinion the said Petition is meritorious.

Given under my hand at Columbia, South Carolina, this first day of October, 1971.

ROBERT McC. FIGG, JR.

THE SUPREME COURT OF SOUTH CAROLINA

October 11, 1971

Carlisle Roberts, Esquire
Messrs. Roberts, Jennings & Thomas
P. O. Box 1792
Columbia, South Carolina

Re: Heublein, Inc. v. South Carolina Tax Commission.

Dear Mr. Roberts:

The Court has this day refused your petition for rehearing in the above case in the following order:

"Petition Denied.

/s/ JOSEPH R. MOSS C. J.
/s/ J. WOODROW LEWIS A. J.
/s/ THOS. P. BUSSEY A. J.
/s/ J. M. BRAILSFORD A. J.
/s/ BRUCE LITTLEJOHN A. J."

The remittitur is being sent down today.

Very truly yours,

FRANCES H. SMITH,
Clerk.

FHS/F
CC: The Honorable G. Lewis Argoe, Jr.

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TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

HEUBLEIN, INC., APPELLANT,

v.

SOUTH CAROLINA TAX COMMISSION, APPELLEE

ON APPEAL FROM THE SOUTH CAROLINA SUPREME COURT

JURISDICTIONAL STATEMENT

INTRODUCTORY PARAGRAPH

Appellant appeals from the judgment of the Supreme Court of the State of South Carolina filed on September 22, 1971, reversing and remanding the order of the Court of Common Pleas, which held that the Appellant was not liable for South Carolina income and license taxes, and submits its statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The Supreme Court of South Carolina delivered a written opinion in this case, the unofficial report being found at 183 S. E. (2d) 710 and the text of the opinion being set out in Appendix A, *infra*, p. 19. The Court of Common Pleas opinion is unreported. The text of this opinion is set out in Appendix B, *infra*, p. 21. The Ruling of the South Carolina Tax Commission is also unreported. The text of this Ruling is set out in Appendix C, *infra*, p. 28.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1257(2), this being an appeal which draws into question the applicability of South Carolina Code of Laws (1962) § 65-222 (the South Carolina corporate income tax statute) and §§ 65-602, 65-606 (the South Carolina corporate license tax statutes) on the ground that they are repugnant to Public Law 86-272 (15 U. S. C. § 381).

On February 1, 1969, the Appellant paid South Carolina income and license taxes [1] assessed by the Appellee for the years ending June 30, 1964 through 1968, and promptly brought suit to recover these taxes. Appellant claimed that the South Carolina income tax statute did not apply to it in light of the Federal Law, Public Law 86-272 which prohibits the imposition of a state income tax on income derived from sales made in interstate commerce if the business activity within the state is limited to solicitation of orders which are sent outside the state for acceptance or rejection and if accepted are filled by shipment or delivery from a point without the state. In its opinion filed September 22, 1971, the Supreme Court of South Carolina held that South Carolina Alcoholic Beverage Control Laws [South Carolina Code of Laws (1962)] §§ 4-131 to 4-150,

[1] License tax liability is dependent upon income tax liability.

App. G, *infra*, p. 29] prohibit interstate sales of alcoholic beverages; that Appellant's sales were intrastate transactions and that Public Law 86-272 was inapplicable, thereby sustaining the validity of the state statutes against the federal challenge. Appellant's petition for rehearing was denied October 11, 1971, and Appellant filed with the Supreme Court of South Carolina its Notice of Appeal to this Court on December 30, 1971.

The jurisdiction of this Court, where a state court holds a state statute to be applicable in the face of the contention that such an application is invalid on federal grounds, has been sustained in *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 83 S. Ct. 631 (1963); *Reconstruction Finance Corp. v. Beaver County Pa.*, 328 U. S. 204, 66 S. Ct. 992 (1946); *Dahnke-Walker Milling Co. v. Bondurant*, 257 U. S. 282, 42 S. Ct. 106 (1921).

In the event that the Court does not consider appeal the proper mode of review, Appellant requests that the papers upon which this appeal is taken be regarded and acted upon as a Petition for Writ of Certiorari pursuant to 28 U. S. C. § 2103.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The Commerce Clause of the United States Constitution set out in Appendix D hereto.

2. The Twenty-first Amendment to the United States Constitution set out in Appendix E hereto.

3. 15 U. S. C. § 381 (Public Law 86-272) set out in full in Appendix F hereto.

4. South Carolina Code of Laws (1962) §§ 4-131 to 4-150, and as amended, (the South Carolina Alcoholic Beverage Control Law) set out in full in Appendix G hereto.

5. South Carolina Code of Laws (1962) §§ 65-222, 65-602 and § 65-606 (the South Carolina corporate income and license tax provisions) set out in full in Appendix H hereto.

QUESTIONS PRESENTED

I. Where a federal statute prohibits the imposition of a state income tax on income from interstate sales, if the only activities within the state consist of the solicitation of orders, may a state render such federal law inapplicable by requiring a nonresident producer of alcoholic beverages to pass technical title to their shipments within the state through a mandatory resident representative?

II. If a nonresident does no more than the state-imposed minimum in effectuating delivery of its products can this state-required minimum exceed the minimum protected by Public Law 86-272?

III. In spite of a mandatory in-state "delivery" requirement is a nonresident protected from state income taxes by virtue of Public Law 86-272 if it fills orders by "shipment" from a point without the state?

STATEMENT

General Background

The Appellant, Heublein, Inc., is a Connecticut corporation engaged in the manufacture and sale of alcoholic beverages. The Appellee, the South Carolina Tax Commission, assessed the Appellant for South Carolina income taxes for the years ending June 30, 1964 through 1968.[2] After an adverse ruling from the Tax Commission [App. C, *infra*, p. 28, Heublein paid the $21,549.50 in taxes and interest assessed and brought suit to recover them. This suit was successful in the Court of Common Pleas but by

[2] License taxes, liability for which is dependent upon liability for income taxes, were also assessed and paid.

its opinion dated September 22, 1971, the Supreme Court of South Carolina reversed the Court of Common Pleas and ruled in favor of the Tax Commission.

During the years in question Appellant complied with the South Carolina Alcoholic Beverage Control Laws [App. G, *infra*, p. 29]. These laws were enacted in 1958 and provide that each producer of alcoholic beverages who sells its products in South Carolina must appoint a "producer representative" within the state and that all shipments of alcoholic beverages must be sent into the state in care of the producer representative who is then responsible for clearing the shipment with the South Carolina Tax Commission (now the Alcoholic Beverage Control Commission) before delivery may be made to the wholesaler in response to whose order the goods were shipped. The South Carolina statutes provide that the alcoholic beverages may be shipped either to a warehouse maintained by the producer or to the wholesaler's warehouse.

In response to the statutory requirement, Heublein appointed its sole salesman in South Carolina as its "producer representative." As Heublein maintained no warehouse in South Carolina all goods were shipped, freight collect, directly from Heublein in Hartford, Connecticut to the wholesaler's warehouse in Columbia, South Carolina. Since Heublein's producer representative was only present at the wholesaler's warehouse part of one day a week most of the shipments arrived in his absence so that the shipping documents were generally accepted by the wholesaler in behalf of Heublein's representative. Once a week Heublein's representative would take the accumulated shipping documents to the South Carolina Tax Commission and perform the required paper work transferring title to the wholesaler.

Proceedings Before the Tax Commission

When agents of the South Carolina Tax Commission insisted that Heublein was responsible for South Carolina income taxes, Heublein requested and was granted a hearing by the Tax Commission. This resulted in a Ruling adverse to Heublein's position. As stated in the Ruling [App. C, *infra*, p. 28] "[Appellant] appears before us today in protest of the assessment, contending that the income is not subject to taxation because of Public Law 86-272. That law sets up certain activities that [Appellant] may do and not be subject to taxation; however [the South Carolina Alcoholic Beverage Control Laws] requires the [Appellant], in order to legally sell its products to the wholesalers, to engage in activities in South Caroina that exceed the minimum as provided for by Public Law 86-272. [Appellant], however, contends that the South Carolina statutes are regulatory and in no way affect the taxability of the income."

Proceedings in the Trial Court

After the Tax Commission issued its adverse Ruling Heublein paid the taxes assessed and brought suit to recover them, again contending that Public Law 86-272 was controlling.

The Court of Common Pleas found that all of Appellant's activities, including those resulting from state compulsion ". . . did not exceed the minimum activities permitted by Public Law 86-272 . . ." [App. B, *infra*, p. 21] and also ruled that the state could not, through the use of regulatory requirements" . . . deprive Heublein of the effectiveness or applicability of the federal law on this subject." [App. B, *infra*, p. 21.]

The Court of Common Pleas further held that even if it were true that the Appellant ". . . because of its compliance with the South Carolina Alcoholic Beverage Control

Laws . . . has exceeded the minimum requirements of Public Law 86-272 (which I have found not to be the case), nevertheless Heublein would not be liable for South Carolina income taxes because the power of a state to tax may not be extended under the guise of the exercise of its police power." [App. B, *infra*, p. 21.]

Proceedings in the South Carolina Supreme Court and How the Federal Question is Presented

The Appellee, South Carolina Tax Commission, appealed the decision of the Court of Common Pleas to the South Carolina Supreme Court. In that Court, Appellee argued that "[a]ny person choosing to import alcoholic liquors into South Carolina in accordance with the Alcoholic Beverage Control Act is subject to State income taxation because the Alcoholic Beverage Control Act anticipates and requires that all persons importing liquor into South Carolina become residents of South Carolina and make deliveries of alcoholic liquors within South Carolina, thereby submitting to the State's complete jurisdiction to regulate and tax. . . . It is the legislative intent to require all importers of alcoholic liquors to pay income taxes to the State." [Brief of South Carolina Tax Commission in the Supreme Court of South Carolina, pp. 9, 10.]

Appellant, Heublein, again took the position that the South Carolina Alcoholic Beverage Control Laws could not be applied so as to subject Heublein to South Carolina income taxes in view of Public Law 86-272. As it argued below [Brief of Heublein in the Supreme Court of South Carolina, pp. 9-10] the imposition of an income tax upon Heublein under the facts of this case ". . . is a burden on interstate commerce which exceeds the burden which is permitted with respect to alcoholic beverages by the 21st Amendment . . . and runs afoul of the express language and purpose of Public Law 86-272."

Thus the Federal question was presented: Whether the South Carolina Alcoholic Beverage Control Laws, as applied, were valid so as to cause Heublein to be subjected to South Carolina income taxes against Heublein's contention that it was not responsible for these taxes by virtue of the Federal Law. The South Carolina Supreme Court resolved this controversy in favor of the applicability of the income taxes to Heublein. It ruled that solely because of Heublein's compliance with South Carolina law the sales of Heublein's products in South Carolina ". . . were, therefore, intrastate transactions and beyond the reach of Public Law 86-272." App. A, *infra*, p. 19.

THE QUESTIONS ARE SUBSTANTIAL

The opinion of the Supreme Court of South Carolina being appealed from holds that South Carolina may force non-resident producers of alcoholic beverages to perform certain rituals within the state which, without affecting the substance of their activities within the state, nevertheless deprive them of the applicability of Public Law 86-272 and subject them to state income taxes.

The decision of the South Carolina Supreme Court on this point conflicts directly with the decision of the highest court of Oklahoma in *Oklahoma Tax Comm'n v. Brown-Forman Distillers Corp.*, 420 P. (2d) 894 (Okla. 1966), and marks the first time it has been held that the provisions of Public Law 86-272 may be so easily circumvented. Serious questions of the interpretation of a federal statute and of the power of Congress under the Commerce clause are thereby raised.

I. South Carolina cannot, by merely requiring the formalities of registration and appointment of a representative, nullify a Federal Statute which otherwise

concededly protects the activities in question from State income taxation.

South Carolina's statutory scheme is concededly designed to augment the State's revenues. [Brief of the South Carolina Tax Commission in the Supreme Court of South Carolina, p. 10.] The findings of the trial court make it abundantly clear that the changes wrought by the State's Alcoholic Beverages Control Act in Appellant's mode of doing business are purely formal [Tr., pp. 47-48]. The question is whether a technique of imposing such formalities, in order to subject Appellant to income taxation in spite of Public Law 86-272, will be successful.

Facts very similar to those here presented underlay *Oklahoma Tax Comm'n v. Brown-Forman Distillers Corp., supra.* The distillers there had likewise confined their voluntary business activities in Oklahoma to areas found to be clearly protected by Public Law 86-272. Oklahoma tax authorities argued that compliance with Oklahoma Alcoholic Beverage regulations, grounded in the Twenty-first Amendment, prevented the distillers from invoking the protection of the Federal Statute. The Court rejected the argument: "The [Oklahoma Tax Commissioner's] reliance on the 21st Amendment is misplaced. No alcoholic beverage regulation is involved here. The general income tax assessments in question are not within the compass of the 21st Amendment." (At 898.)

The same result is clearly required in the instant case. South Carolina is here exacting revenue, not imposing regulation. The legislative intent was "to require all importers of alcoholic liquors to pay income taxes to the State." [Brief of South Carolina Tax Commission in the Supreme Court of South Carolina, p. 10.]

Moreover, the decision of the Supreme Court of South Carolina, while discussing the proposition, with which Appellant does not quarrel, that a state may regulate the sale

of alcoholic beverages under the Twenty-first Amendment, really turns on its characterization of Appellant's business as "intrastate". This characterization is the court's sole reason for subjecting Appellant to this taxation. [App. A, at p. 19.] But it is anomalous indeed that South Carolina should interpret the word "intrastate", for purposes of determining the applicability of Public Law 86-272, so as to completely frustrate the purpose of that Statute.

There can be no doubt that the purpose of Public Law 86-272 is to free commerce which is in fact interstate from the burden of complying with myriad, diverse, inconsistent overlapping and onerous state income taxes. [S. Rep. No. 658, 86th Cong., 1st Sess. 2-5 (1959)]. Congress was particularly concerned with the high cost of compliance with the different state tax laws, and the possibility of double taxation. Central also to the Committee's report was the dependence of the tax liability upon each State's own, and divergent, constructions of such terms as "sale". [S. Rep. No. 658, 86th Cong., 1st Sess. 3 (1959)] There is no reason to suppose Congress really intended Public Law 86-272 to have the sole effect of shifting the emphasis from the ways the individual states defined "sale" to the ways they might choose to define "intrastate". Congress clearly wished to avoid the burdens on interstate commerce of non-uniform state income taxation of businesses in fact interstate. This result is not achieved if the states can, through their own interpretations of Public Law 86-272, reassert their individual power to levy diverse income taxes on a large segment of interstate commerce.

The issue involved in this case has ramifications far beyond Heublein and the State of South Carolina. If South Carolina is successful here, not only will the other distillers selling in the state, 71 at last count, be subjected in quick order to this tax, but every other state in the Union which feels the need for additional revenue will be tempted to

enact legislation requiring the simple formalities which will have been proven so effective in extending state taxing power. Georgia, for example, has regulations similar to South Carolina's Alcoholic Beverage Control Laws. It has evinced an interest in asserting its taxing power on substantially the same ground relied upon by Appellee.[3] There is every reason to believe that many states, in their ever-increasing search for additional revenue, will in fact adopt the South Carolina approach and subject all producers of alcoholic beverages to state income taxes.

Indeed, it may be a forlorn hope to suppose the technique here employed will be limited to the liquor industry. What is to prevent any state from using its police powers in any area of commerce to require a filing, or a registration, or appointment of an agent; anything in fact that its own courts could construe as "intrastate" and therefore "beyond the reach of Public Law 86-272"?

If South Carolina can successfully use its regulatory power to remove Appellant from the protection of Public Law 86-272, it is open for any other state to do the same. The federal statute thus becomes no more than a temporary impediment to the collection of revenue from firms

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[3] Letter addressed to counsel for the Appellant dated December 16, 1971, from Stuart S. Opotowsky, General Tax Counsel of Norton Simon Inc.

Norton Simon Inc. is the parent corporation of Somerset Importers, Ltd., distributors of Johnnie Walker scotch and other alcoholic beverages. The State of Georgia has attempted to tax us on the same grounds that the State of South Carolina used in the *Heublein* case.

The State of Georgia in August, 1971, proposed a deficiency assessment against Somerset Importers for the years ended June 30, 1968, 1969 and 1970. Somerset had not paid Georgia income taxes. It does not maintain its office, warehouse or stock of goods or any other property in Georgia. Sales orders are accepted in New York and deliveries are made by common carrier shipped from outside the State of Georgia to our customers within Georgia consigned to our registered representative in Georgia in accordance with the requirements of Georgia law. We have protested the proposed deficiency and are awaiting a hearing at the lowest administrative level.

engaged in interstate commerce, to be overcome by the inventiveness of the state taxing authorities.

What had been settled after the highest court in Oklahoma had rendered its opinion in *Oklahoma Tax Comm'n v. Brown-Forman Distillers Corp., supra,* has now become disturbingly unsettled. It would be to everyone's advantage to have this Court resolve as soon as possible the uncertainty created by the South Carolina Supreme Court's opinion.

If the conflict between the Oklahoma Supreme Court and the South Carolina Supreme Court were resolved in favor of the view expressed by the South Carolina Supreme Court certainly every state may subject all commerce in alcoholic beverages, and very likely many other commodities, to its local income taxation thus returning the alcoholic beverage industry, and probably many others as well, to the chaotic state of affairs which gave birth to Public Law 86-272.

At best, this would set off the next round of Congressional and State legislative activity, followed by judicial interpretation. But worse, it may mean that Congress has been effectively prevented from dealing with the problem at all. An interpretation of Public Law 86-272 permitting this result cannot be correct.

II. The Twenty-first Amendment does not prevent Federal regulation of the income taxation of Interstate Commerce in alcoholic beverages.

It is beyond the point of argument that the Twenty-first Amendment did not repeal the Commerce Clause with respect to alcoholic beverages:

> [The Conclusion] that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplifi-

cation. If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a contention would be patently bizarre and is demonstrably incorrect. *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U. S. 324, 331-332, 84 S. Ct. 1293, 1298 (1964).

And, of course, Congress has a long history of regulating interstate commerce, including the liquor industry, where national policy so required, *e. g.*, Federal Alcohol Administration Act, 27 U. S. C. § 201 *et seq.;* The National Labor Relations Act, 29 U. S. C. § 151 *et seq.;* The Fair Labor Standards Act, 29 U. S. C. § 201 *et seq.;* 18 U. S. C. § 659, relating to thefts from interstate shipments, and many more. Appellee cannot seriously propose that all the Acts of Congress, relating to interstate commerce, are inapplicable to Appellant because of its compliance with South Carolina's Alcoholic Beverage Control Laws. South Carolina would have us believe that it can eliminate interstate commerce in alcoholic beverages for purposes of federal legislation by judicial interpretation. If this be true then Congress would be powerless to enact any legislation effecting traffic in alcoholic beverages in South Carolina and in any other state which adopted the South Carolina approach.

States have the power to regulate traffic in alcoholic beverages within their borders but in this instance the State of South Carolina is not seeking to regulate alcoholic beverage traffic—it is seeking to place an **income tax** on this traffic. On the other hand Congress, by means of Public Law 86-272, is attempting to mitigate the income tax burdens interstate commerce, including interstate commerce in alcoholic beverages, must bear as a result of the wide variety of income tax provisions spawned by the

many taxing jurisdictions contained in our Federal system. The incompatibility of the two positions is apparent.

The authority for the Federal position is found in the Commerce Clause. The authority cited by the South Carolina Tax Commission, which they claim gives them the right to denominate Appellant's activities as "intrastate" for income tax purposes, is the Twenty-first Amendment. Cases decided by this court, upholding state regulation of alcoholic beverages, *e. g., Ziffrin, Inc. v. Reeves,* 308 U. S. 132, 60 S. Ct. 163, 84 L. Ed. 128 (1939), relied upon by Appellee below, are not in point. We are not here concerned with the validity of state police regulation of liquor traffic, but with the propriety of refusing Appellant protection from state income taxation under Public Law 86-272. The object is not to find a name for what Appellant does, but to determine if the purpose of Public Law 86-272 requires its application to Appellant. Since the purpose of achieving uniformity, discussed above, most certainly does warrant the application of the Statute to Appellant, and no state interest protected by the Twenty-first Amendment argues against such an application, Public Law 86-272 ought to be applied.

III. **What the State requires as a minimum to effectuate delivery of products within that State should be within the minimum protected by Public Law 86-272.**

Heublein argued in the Court of Common Pleas and in the Supreme Court of South Carolina that since it had done the very minimum it could under South Carolina law this state-imposed minimum should come within the activities protected by Public Law 86-272. This argument was successful in the Court of Common Pleas but was rejected by the South Carolina Supreme Court. Appellant would wish to reserve this point for argument before this Court.

IV. Notwithstanding the State imposed delivery procedure Heublein is not responsible for State income taxes by virtue of Public Law 86-272 if its products are "shipped" from a point without the State.

Heublein would wish to reserve for argument in this Court the point argued below that if the other requirements of Public Law 86-272 are met a nonresident is not liable for state income taxes if "shipment or delivery" is from a point without the state. Because the Federal law requirements are framed in the alternative if in this instance the state-imposed method of delivery is found to be sufficient to justify imposition of state income taxes the question remains as to whether or not Appellant can escape payment of these taxes by reliance on its out-of-state "shipment." There is no question but that the goods were shipped from Hartford, Connecticut, to the wholesaler's warehouse in Columbia, South Carolina (certainly not from Heublein in the wholesaler's warehouse to the wholesaler in the same building). Admittedly formal title was still with Appellant in Columbia, South Carolina, until the title documents were cleared by its representative through the South Carolina Tax Commission, but the whole purpose of Public Law 86-272 was to avoid consideration of the technical formalities as to where title might pass [S. Rep. No. 658, 86th Cong., 1st Sess. 3-4 (1959)] and instead to focus the examination on the tests set forth in the Federal law. If this be done then "shipment" is most certainly from a point without South Carolina, and it makes no difference whether "delivery" is or is not from a point without the state—Appellant is within the minimum requirement of Public Law 86-272 and therefore not liable for South Carolina income taxes.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction and reverse the judgment below.

Respectfully submitted,

W. Croft Jennings, Jr.,
Attorney for Appellant,
Heublein, Inc.